IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Aaron C. Wheeler, et. al.	:	
Plaintiffs	:	CIVIL ACTION
	:	No. 03-4826
v.	:	
	:	
Jeffrey Beard, et. al.	:	
Defendants	:	
	:	

Yohn, J. May _____, 2005

Memorandum and Order

Pro se plaintiffs Aaron Wheeler, Theodore Savage, James Pavlichko, and Derrick Fontroy are prisoners currently incarcerated at State Correctional Institution at Graterford ("SCIG") in Pennsylvania. Defendants are employees of the Pennsylvania Department of Corrections ("DOC") and vendors with which the DOC has entered into contracts to provide goods and services to the Commonwealth's inmate population. Movants Jeffrey A. Beard, Donald G. Vaughn, John Rosso, and Michael Spencer (collectively "DOC Defendants") are, respectively, the Secretary of Corrections, the Superintendent of SCIG, the Commissary Manager at SCIG, and the Business Manager at SCIG.[1] Movants Access Catalog Company ("Access"),

[1]In addition to naming Beard, Vaughn, Rosso, and Spencer, who are alleged in the Second Amended Complaint to have violated federal antitrust laws and to have committed fraud and misrepresentation, plaintiffs sue thirty-four other DOC employees, who are alleged to have violated plaintiffs' civil rights. This opinion will focus on the sufficiency of the federal antitrust and common law claims in the Second Amended Complaint to the exclusion of the civil rights claims, which are the subject of a separate disposition. The parties referred to collectively as the "DOC Defendants" for purposes of this opinion are actually a subset of the larger group of defendants named in the case.

Mike's Better Shoes (MBS), and Jack L. Marcus, Inc. (JLM) are vendors in the business of providing, through a catalog service, apparel, shoes, and other personal items that may be bought by or on behalf of prisoners incarcerated in Pennsylvania prisons. Movant Verizon Pennsylvania, Inc. ("Verizon") is a vendor providing telephone services to inmates at SCIG.

Pending before the court are motions by the DOC Defendants and Access, MBS, JLM, and Verizon (collectively "Moving Vendor Defendants") to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), the antitrust and common law fraud and misrepresentation claims in plaintiffs' Second Amended Complaint.[2] For the reasons stated herein, these motions will be granted.

I. Procedural History

On August 8, 2003, plaintiffs filed their initial *pro se* complaint in this matter. The complaint was twice amended before being filed in its present form on September 8, 2004. In addition to constitutional claims relating to their conditions of confinement and retaliation claims based on their having filed an earlier lawsuit, plaintiffs in their Second Amended Complaint bring antitrust claims under §§ 1 and 2 of the Sherman Act and the Clayton Act, alleging that the DOC Defendants and the Moving Vendor Defendants, along with additional vendor defendants Dick Blick's Art Supply, Sam Ash Music Supply and T-Netix (collectively "Non-moving Vendor Defendants"),[3] entered into illegal contracts in restraint of trade, conspired to monopolize

[2]Defendants Vaughn and Beard are also named in portions of the Second Amended Complaint that allege civil rights violations. Their motion to dismiss plaintiffs' civil rights claims against them is the subject of a separate opinion.

[3]Hereinafter, the term "Vendor Defendants" will be used to refer collectively to the Moving Vendor Defendants and the Non-moving Vendor Defendants.

the prison market for consumer goods and services, and engaged in illegal price fixing. Plaintiffs further allege that, in the course of providing goods and services to the prison market, the DOC Defendants and the Vendor Defendants collectively engaged in fraud and negligent misrepresentation.

Several defendants in the case filed motions to dismiss the complaint prior to the submission of the Second Amended Complaint. These motions were renewed, and, in some cases modified or supplemented, following submission of the Second Amended Complaint. To date, 12(b)(6) motions have been filed by all of the DOC Defendants and by Vendor Defendants Access, JLM, Verizon, and MBS.[4] Plaintiffs have filed responses to these motions.[5] This opinion decides the motions of all parties only with respect to the antitrust and common law fraud and misrepresentation claims in the Second Amended Complaint.

II. Discussion

A. Legal Standard

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of a complaint. *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46

[4]Three separate motions to dismiss were filed on behalf of three different subsets of the DOC Defendants.

[5]Plaintiffs filed a single response to the multiple motions of the DOC Defendants. The court will treat this single response as a response to all three motions. Plaintiffs filed an individual response to each of the motions filed by the Moving Vendor Defendants. In some of their responses, plaintiffs allege facts not alleged in the Second Amended Complaint relating to specific transactions in which they engaged with some of the Vendor Defendants. In the interest of judicial economy, and in light of the principle that *pro se* pleadings are to be liberally construed, I will treat the facts alleged with respect to these transactions as though they had been raised, with leave of the court, in a successive amended complaint. However, plaintiffs will not be permitted to plead any new facts in subsequent submissions to the court.

(1957)). In evaluating a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989) (citing *Wisniewski v. Johns-Manville Corporation*, 759 F.2d 271, 273 (3d Cir. 1985)). The court may dismiss a complaint, "only if it is certain that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swin Resource Systems, Inc. v. Lycoming County, Pennsylvania, acting through the Lycoming Company Solid Waste Department*, 883 F.2d 245, 247 (3d Cir. 1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

"A *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) (quoting from *Haines v. Kerner*, 404 U.S. 519 (1972)).

B. Antitrust Claims

According to plaintiffs, prior to the adoption of Department of Corrections Policy No. DC-ADM 815, which is a systemwide policy governing inmate property, inmates were permitted to purchase items from a variety of vendors of their own choosing, including national retailers such as J.C. Penney, Boscov's, Woolworth, and Walmart. *See* Second Amended Complaint ("SAC") at 98. Under DC-ADM 815, however, inmates incarcerated in Pennsylvania prisons are limited in both the kinds of property they may acquire and the sources from which they may acquire it. *See* DC-ADM 815 V. D. (effective September 3, 2002). When inmates desire to

purchase DOC-approved items from sources other than the prison commissary, those sources are restricted under DC-ADM 815 to a specific roster of pre-approved vendors. *See id.*

Plaintiffs allege that the adoption of DC-ADM 815 led directly to the formation of illegal contracts between the DOC and the Vendor Defendants, who conspired in violation of federal antitrust laws to restrain trade in the prison market for "televisions, radios, walkmans, underclothing, footwear, cable services and telephone services." SAC at 98. Plaintiffs further allege that the DOC Defendants receive over nine million dollars annually in "kickbacks" from the Vendor Defendants in exchange for giving them exclusive rights to sell to the inmate market. *Id.* at 99.

According to plaintiffs, the arrangement between the DOC and the Vendor Defendants is such that the Vendor Defendants not only supply goods directly to inmates (e.g., via catalog sales), they also supply goods to the DOC for retail sale in the prison commissary. *Id.* Plaintiffs aver that the goods sold in the commissary are often defective, and that the DOC Defendants have exercised their "market power" to force defective products on a "captive" population that is unable to enter the marketplace in search of alternatives. *Id.* at 98. As a result of the conspiratorial contracts and the DOC's abuse of its market power, plaintiffs argue, inmates have no choice but to purchase inferior products at inflated prices[6] and to suffer damages without recourse when the products fail, which they inevitably do. *Id.* at 98-99.

The Sherman Act prohibits every contract, combination in the form of trust or otherwise,

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[6]Items sold in the prison commissary are "limited to a 5% maximum markup, except for cigarettes, which are subject to a $.02 per package markup." *See* DC-ADM 815-8. The Third Circuit has held that a 10% markup on items sold in New Jersey state and county prison commissaries does not constitute a violation of inmates' constitutional rights. *Myrie v. Commissioner*, 267 F.3d 251 (3d Cir. 2001).

or conspiracy in restraint of interstate or foreign commerce. 15 U.S.C. § 1. It also prohibits monopolization or attempted monopolization by any person or combination of persons of any part of interstate or foreign commerce. *Id.* at § 2.

Movants argue that, even if plaintiffs' allegations that defendants engaged in concerted anticompetitive conduct are as accepted as true, which they must be for purposes of deciding a motion to dismiss, the Vendor Defendants and the DOC Defendants in this case are immune from federal antitrust liability under the state action doctrine articulated by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943).

In *Parker*, the Court held that the Sherman Act was not intended to restrain state action or official action directed by the state. *Id.* at 351. Accordingly, a state clearly acting in its sovereign capacity avoids the constraints of the Sherman Act and may act anti-competitively to further other policy goals. *A.D. Bedell Wholesale Co., Inc. v. Phillip Morris, Inc.*, 263 F.3d 239, 255 (3d Cir. 2001) (citing *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 54 (1985)). While Parker immunity applies explicitly only to states and state actors, courts have held that it must be extended to private parties if the doctrine is to be given true effect. *A.D. Bedell Wholesale Co.*, 263 F.3d at 256 n.35. Otherwise, a plaintiff could frustrate state policy simply by suing any of the private parties with which the state enters into anti-competitive agreements in furtherance of governmental goals. *Id.*

When private parties are involved, the court applies the two-pronged test announced in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980), to determine whether the private anti-competitive conduct in question should be deemed state action and thus shielded from antitrust laws. *A.D. Bedell Wholesale Co.*, 263 F.3d at 255. To

satisfy *Midcal*'s requirements for the extension of Parker immunity to private parties, the challenged restraint must be clearly articulated and affirmatively expressed as state policy, and the private anti-competitive conduct involved must be actively supervised by the state. *S. Motor Carriers Rate Conference, Inc.*, 471 U.S. at 45.

A policy is considered to be "clearly articulated" if state statutes create a regulatory structure that would logically result in anti-competitive effects. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41-42 (1985). It is not necessary for the legislature to expressly state in either the statutes themselves or their legislative history that the legislature intends actions taken pursuant to statutorily delegated authority to have anti-competitive effects. *Id.* at 42 (citing *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978)). The question in this case, then, is whether Pennsylvania has created a statutory scheme for prison regulation that implicitly contemplates anti-competitive action by DOC officials.

As an administrative agency, the DOC is a creature of the legislature and has only those powers that are conferred by statute. *See Small v. Horn*, 722 A.2d 664, 669 (Pa. 1998). The Supreme Court of Pennsylvania has held that the DOC's authority to make rules governing the management of state correctional facilities can fairly be implied from its enabling statute. *Id.* As the head of the Department of Corrections, the Secretary of Corrections (i.e., DOC defendant Beard) has been vested by the Pennsylvania legislature with all "powers and duties related to the administration, management and supervision of penal and correctional facilities, programs and services." 71 P.S. § 310-1.

It is the Secretary's legislatively delegated function to assess institutional needs in Pennsylvania prisons and to promulgate policies to meet those needs. Such policies may entail

significant restrictions on the personal rights of individual prisoners. *See Small*, 722 A.2d at Pa. at 669-670 ("Because of the unique nature and requirements of the prison setting, imprisonment 'carries with it the circumscription or loss of many significant rights. . . to accommodate a myriad of institutional needs. . . chief among which is internal security."). DOC Policy No. DC-ADM 815, which was promulgated by the Secretary of Corrections acting under the authority of 71 P.S. § 310-1 and related statutory provisions, expressly states that it is DOC policy to impose "limitations on the amount and variety of inmate property...for security, hygiene, and/or safety reasons."

When the Pennsylvania legislature conferred on the Secretary of Corrections broad powers to administer prison programs and facilities, it implicitly gave him discretion to determine that a free market for goods and services is antithetical to the high degree of internal regulation that is required to maintain a secure institutional environment. In placing restrictions on both the right of prisoners to purchase and possess personal property and the sources from which that property may be obtained, the Secretary exercised the authority delegated to him by the legislature to manage and supervise prison facilities, programs, and services. Limiting the nature of the property inmates may possess and the vendors from which they may acquire it is squarely within the Secretary's discretion. *See Small*, 722 A.2d at 670 (holding that DOC-issued bulletins banning inmate purchases of civilian clothing from previously authorized outside vendors and requiring the removal of non-conforming apparel from prisons "embody decisions that are inherently committed to the agency's discretion"). Thus, Pennsylvania's statutory scheme for prison regulation, enacted by the legislature and approved by the governor, implicitly contemplates anti-competitive action for the sake of sound prison management. The first prong

of the *Midcal* test is therefore satisfied in this case.

The second prong of the *Midcal* test is active state supervision of the private conduct. Its function is an evidentiary one: to ensure that the challenged action is being engaged in pursuant to state policy and to prevent the state from getting around the Sherman Act "by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Town of Hallie*, 471 U.S. at 46-47 (internal citation omitted). "The essential inquiry of the 'actively supervised' prong is to determine if the anticompetitive scheme is the state's own." *A.D. Beddell Wholesale Co.*, 263 F.3d at 260 (internal citation omitted).

Here, the anti-competitive regulatory scheme involved is clearly expressed in policy directives issued by the Secretary of Corrections pursuant to statutorily delegated authority. These directives specify with a high degree of detail what items prisoners may purchase, in what quantities the items may be purchased, and through what mechanisms the items may be purchased (e.g., from the commissary's inventory or by special order through the commissary). *See* DOC Policy No. DC-ADM 815. The outside vendors with which the DOC contracts to provide goods and services to prisoners are actively chosen by the DOC through a state-mandated competitive bidding process. *See Wishnefsky v. T-Netix, Inc.*, Civil Action No. 1:CV-04-0896 (M.D. Pa. September 21, 2004). Taken together, these factors compel the conclusion that the contracts between the DOC and the Vendor Defendants are not a result of the state's passive acquiescence in a private anti-competitive scheme; rather, they are the product of an actively supervised state program designed to ensure the secure and efficient operation of state correctional facilities. *See Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001) ("Far from being the mere agents of the phone companies, the prisons are in the driver's seat, because it is

they who control access to the literally captive market constituted by the inmates."). Because the anti-competitive regulatory scheme in this case is demonstrably the state's own, the second prong of the *Midcal* test is also satisfied.

Plaintiffs seek to defeat Parker immunity in this case by arguing (1) that the DOC Defendants receive "kickbacks" from the Vendor Defendants in exchange for exclusive dealing and (2) that the DOC Defendants have forfeited their state action immunity by becoming "market participants" in the prison market for goods and services. SAC at 98, 102. Neither of these arguments is persuasive. Accepting plaintiffs' characterization of the sums remitted to the DOC by vendors as "kickbacks" does not undermine the applicability of Parker immunity. This is true because "[l]iability for injuries caused by [anti-competitive] state action is precluded even where it is alleged that a private party urging the action did so by bribery, deceit, or other wrongful conduct that may have affected the decision making process." *Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hospital*, 185 F.3d 154, 162 (3d Cir. 1999) (discussing *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991)). Furthermore, contractual arrangements pursuant to which a prison receives a portion of the proceeds from an anti-competitive contract have been held to pose no threat to Parker immunity. *See, e.g., McGuire v. Ameritech Services, Inc.*, 253 F. Supp. 2d 988 (S.D. Ohio 2003) (upholding the legality of an exclusive contract between the Ohio Department of Rehabilitation and Corrections ("the ODRC") and a phone company under which the ODRC was paid a 50% commission on all prisoner-placed collect calls).

Plaintiffs' argument that the DOC has abandoned its entitlement to sovereign prerogatives by becoming a "market participant" is also unavailing. The Supreme Court has

never actually held that state action as a market participant abrogates Parker immunity.[7] The Third Circuit has said in dicta that there is "a market participant exception to actions which might otherwise be entitled to Parker immunity."[8] *A.D. Bedell Wholesale Co.*, 263 F.3d at 265 n.55. The Third Circuit has also said, however, that a state does not become a market participant merely by acting with a private party or parties. *Id.*

The decisive test for market participation is whether the state is "acting in its distinctive governmental capacity" or whether it is "acting in the more general capacity of market participant." *Id.* To begin with the obvious, the prison market for goods and services is nothing like a free market in the conventional sense (*i.e.*, one in which participants, be they buyers or sellers, make free choices). On the contrary, it is, as plaintiffs assert, a "captive" market–a market in which the operation of the laws of supply and demand is always subject to the DOC's mandate to manage prison operations efficiently and safely. All aspects of prisoners' lives, including their consumer choices, are legitimately subject to close regulation by the DOC. When the state of Pennsylvania, acting through the DOC, makes a regulatory decision that the provision of a particular range of goods and services within prisons should be accomplished through the establishment and operation of prison commissaries, it is acting in a governmental capacity. So,

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[7]The so-called market participant exception to Parker immunity derives from the *Parker* Court's observation that, in deciding that the Sherman Act did not apply to the State of California's anti-competitive raisin marketing program, it was not deciding a case in which the state or its municipality had become a participant in a private agreement or combination by others in restraint of trade. *Parker*, 317 U.S. at 351-352.

[8]Citing a lack of guidance from the Supreme Court with respect to the issue of state market participation in the antitrust context, the Third Circuit in *A.C. Beddell Wholesale Co.* turned to discussions of market participation in dormant commerce clause jurisprudence. *A.D. Bedell Wholesale Co.*, 263 F.3d at 265 n.55.

too, it is acting in a governmental capacity when it gives the DOC authority to enter into contracts with individual vendors to supply goods and services either directly to inmates or through prison commissaries.

Plaintiffs urge upon the court the argument that the DOC's direct sales of consumer goods to inmates automatically make it a market participant ineligible for Parker immunity. However, it is decisive of the issue that the DOC's actions as a vendor are purely incidental to its actions as a regulator. In operating prison commissaries, the state cannot fairly be said to be acting generally as a market participant. *See Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 717 (3d Cir. 1995) (holding, in the dormant commerce clause context, that the state of New Jersey acted as a regulator and not as a market participant in implementing a solid waste disposal program that controlled the market activities of private market participants by requiring them to purchase government-provided services, even when a better price could be obtained on the open market). To the extent that the DOC can be said to be participating in the market as a seller, it does so only in furtherance of the overarching regulatory purpose of efficiently and effectively controlling the nature and variety of goods circulating within Pennsylvania prisons. Because the DOC's market participation is no more than a means to a demonstrably regulatory end, the DOC Defendants cannot be said to have forfeited Parker immunity.

Defendants in this case, both the DOC Defendants and the Vendor Defendants, are entitled as a matter of law to Parker immunity. Accordingly, plaintiffs' antitrust claims must be dismissed with prejudice pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

C. Common Law Fraud and Negligent Misrepresentation Claims

Plaintiffs allege that, in addition to offering vendors' "defective products and services" for sale in the commissary, the DOC Defendants knowingly falsely advertise these products and services throughout the prison in an effort to induce inmates to purchase them. SAC at 100. The products are advertised, according to plaintiffs, "as coming in good condition and without any defects." *Id.* at 101. Plaintiffs allege that they acted upon the false advertisements when they purchased defective products and services, among which were products and services sold by the Vendor Defendants. *Id.*

With respect to allegations against individual defendants, plaintiffs make no specific allegations in their Second Amended Complaint concerning products sold by Access, although they do make several allegations in their reply brief. Wheeler alleges that Access intentionally misrepresented the construction and workmanship of a footlocker he ordered from its catalog. Plaintiffs' Brief in Reply to Access Catalog's Motion to Dismiss at 11. The footlocker was described as having a vinyl cover, but when it arrived, Wheeler allegedly discovered that it did not.[9] *Id.* Wheeler also claims to have discovered that the materials with which the trunk was made were cheap and flimsy. *Id.* In addition to allegations concerning the footlocker, Wheeler claims that, while he was incarcerated at the State Correctional Institution at Frackville, Access sold him a defective watch, a defective electric shaver, a defective cassette radio, and a defective typewriter. *Id.* at 9. Savage alleges that Access sold him a defective typewriter. *Id.* at 10.

As to defendant MBS, Wheeler claims, also in plaintiffs' reply brief, that he ordered

[9]Wheeler concedes that the foot locker was later repaired by Access, although he alleges that Access lied to him by telling him that the repaired item was, in fact, new.

shoes from MBS that, unbeknownst to him at the time of his order, violated SCIG regulations prohibiting footwear containing metal parts. Plaintiffs' Brief in Reply to Mike's Better Shoes' Motion to Dismiss at ¶ 64. When it was discovered by SCIG mailroom staff that the shoes contained metal parts, the shoes were returned to MBS, but MBS did not give Wheeler a full refund to compensate him for both the cost of the shoes and the shipping. *Id.* Wheeler maintains that he is entitled to a complete refund, including the cost of shipping. *Id.*

Plaintiffs make no specific allegations in either the Second Amended Complaint or their reply briefs concerning products purchased from JLM or Dick Blick's Art Supply. As for Verizon and T-Netix, the Second Amended Complaint alleges that they failed to "correct the numerous complaints in reference to the prepaid calling system or refund Plaintiffs…money for failure to render the requested services." SAC at 103. Specifically, they allege that Verizon and T-Netix knowingly overcharged them, charged them for calls that were never connected, subjected them to delayed connections and disconnections, and charged both parties for the same call. *Id.* They further allege that Verizon and T-Netix "deliberately used false and misleading advertisements" in the form of fliers posted by DOC staff in various locations at SCIG. *Id.* at 101.

To state a claim for fraud, a plaintiff must meet the requirements of Federal Rule of Civil Procedure 9(b), which applies not only to fraud claims brought under federal statutes, but to those brought under state law. *Christidis v. First Pennsylvania Mortg. Trust*, 717 F.2d 96, 99 (3d Cir. 1983). Rule 9(b) requires that a claim of fraudulent misrepresentation be pled with particularity. Specifically, it requires the plaintiff to plead five elements: (1) a specific false representation of material facts; (2) knowledge by the person who made it of its falsity; (3)

ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) action upon it by the plaintiff, to his damage. *Id.*

To state a claim for negligent misrepresentation, plaintiffs must allege: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and; (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. Negligent misrepresentation differs from intentional misrepresentation in that the misrepresentation must concern a material fact and the speaker need not know his or her words are untrue, but must have failed to make a reasonable investigation of the truth of these words. Moreover, like any action in negligence, there must be an existence of a duty owed by one party to another. *Bortz v. Noon*, 729 A.2d 555, 561 (Pa., 1999) (internal citations omitted).

Movants argue that plaintiffs have failed to plead their common law fraud and misrepresentation claims with the particularity required by Rule 9(b), even when the liberality with which *pro se* pleadings must be construed is taken into account. *See Floyd v. Brown & Williamson Tobacco Corp.*, 159 F. Supp. 2d 823, 832 (E.D. Pa. 2001) (stating that *pro se* plaintiffs are not relieved of the requirements of Rule 9(b)). However, I need not reach the question of whether plaintiffs have carried their burden under Rule 9(b) for pleadings of fraud, because, as movant Verizon argues, plaintiffs' fraud and negligent misrepresentation claims must be dismissed pursuant to the "gist of the action" doctrine–a legal doctrine which precludes a plaintiff from recovering in tort for claims that really sound in contract.

Although the Pennsylvania Supreme Court has not yet adopted the gist of the action doctrine, both the Pennsylvania Superior Court and a number of United States District Courts

have predicted that it will. *See Sullivan v. Chartwell Investment Partners, L.P.*, 2005 Pa. Super. LEXIS 733, at *18 (Pa. Super. April 5, 2005); *eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 14 (Pa. Super. 2002); *Bash v. Bell Tel. Co. of Pennsylvania*, 601 A.2d 825 (Pa. Super. 1992); *Asbury Auto. Group LCC v. Chrysler Ins. Co.*, 2002 U.S. Dist. 117, at *9 n.3 (E.D. Pa. January 7, 2002); *Caudill Seed and Warehouse Co., Inc. v. Prophet 21, Inc.*, 123 F. Supp. 2d 826, 833 n.11 (E.D. Pa. 2000).[10] The gist of the action doctrine is applied to maintain the conceptual distinction between the theories of breach of contract and tort by preventing a plaintiff from recasting ordinary breach of contract claims as tort claims. *Bash*, 601 A.2d at 829.

"When a plaintiff alleges that the defendant committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim and determine whether the 'gist' or gravamen of it sounds in contract or tort." *Sunquest Info. Sys. v. Dean Witter Reynolds*, 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999). To determine whether the gist of the claim sounds in contract or in tort, the court must determine the source of the duties allegedly breached. *Werner Kammann Maschinenfabrik v. Max Levy Autograph, Inc.*, 2002 U.S. Dist. LEXIS 1460, at *19 (E.D. Pa. January 31, 2002). If the duties flow from an agreement between the parties, the claim is deemed to be contractual. *Id.* Conversely, if the duties breached were of a type imposed on society as a matter of social policy, the claim is deemed to sound in tort. *Id.* at *19-20. In other words, if the duties in question are intertwined with contractual obligations, the claim sounds in contract, but if the duties are collateral to the contract, the claim sounds in tort. *See Sunquest*, 40

[10]In addition, the Third Circuit has upheld a summary judgment for the defendants in a products liability case involving overlapping claims of fraudulent concealment and breach of warranty, citing Pennsylvania courts' "lack of hospitality to tort liability for purely economic loss." *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 680 (3d Cir. 2002).

F. Supp. 2d at 651 (holding that a tort claim is maintainable only if the contract is 'collateral' to conduct that is primarily tortious).

The duties asserted by plaintiffs here–duties involving the provision of goods and services that are free from defects and otherwise in conformity with consumer expectations–arise exclusively from sales contracts into which plaintiffs entered with either the individual Vendor Defendants or the SCIG commissary. In the case of Verizon, the duties owed arise from tariffs the company has filed, pursuant to applicable state law, with the Pennsylvania Public Utility Commission. *See MCI Telecommunications Corp. v. Teleconcepts*, 71 F.3d 1086, 1103 (3d Cir. 1995) ("The Pennsylvania Public Utility Law requires public utilities to file tariffs with the PUC. These tariffs are binding and dispositive of the rights and liabilities between the customer and the public utility.") (internal citations omitted). Plaintiffs' claims of fraud and negligent misrepresentation are rooted entirely in allegations that they did not get what they bargained for when they agreed to purchase particular goods and services. The breaches of duty they allege are thus breaches of *contractual* duties.

In a case such as this, the gist of the action doctrine bars the asserted tort claims because the gravamen of the claims is in contract. *See Werner*, 2002 U.S. Dist. LEXIS at *21 (holding that the gist of the action doctrine barred a fraud claim against a manufacturer that made express representations, which were unfulfilled upon delivery, that certain heating elements would be enclosed in a furnace); *Caudill*, 123 F. Supp. 2d at 833-834 (applying the gist of the action doctrine to bar a fraud claim against a software company that provided software that never worked as promised); *Horizon Unlimited, Inc. v. Silva*, 1998 U.S. Dist. LEXIS 2223 (E.D. Pa.) (dismissing, pursuant to the gist of the action doctrine, a negligent misrepresentation claim

premised on allegedly false statements made in promotional literature); *Factory Mkt. v. Schuller Int'l.*, 987 F. Supp. 387, 394-395 (E.D. Pa. 1997) (applying the gist of the action doctrine to bar fraud and negligence claims against a roofer who agreed to repair a chronically leaking roof and repeatedly attempted to repair it, even though he knew from the outset that it was beyond repair).

Because plaintiffs have mischaracterized contract claims as tort claims, and because Pennsylvania courts have adopted the gist of the action doctrine to bar recovery in tort when claims are so mischaracterized, plaintiffs' fraud and negligent misrepresentation claims must be dismissed as to both the DOC Defendants and the Moving Vendor Defendants for failure to state a claim upon which relief can be granted.

The claims against Access relating to allegedly defective products and the claim against MBS for failure to provide a full refund following the return of Wheeler's shoes are dismissed with prejudice, but with leave to supplement the Second Amended Complaint with a new count to recharacterize the claims as contract claims.[11]

The claims against the DOC Defendants are dismissed with prejudice and without leave to amend the complaint to allege breach of contract. The DOC Defendants have asserted qualified immunity, to which they are entitled as a matter of law for claims arising from their performance of discretionary functions and not involving any alleged violation of statutory or constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions generally are shielded from liability for

[11]The leave to amend is granted only for claims based on specific facts alleged in the Second Amended Complaint and in plaintiffs' responses to the Access and Mike's Better Shoes motions to dismiss. No new facts may be alleged relating to any items or services purchased from DOC Defendants or Vendor Defendants.

civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). Both the tort claims plaintiffs raise and the breach of contract claims they might have raised instead arise from the DOC defendants' discretionary administration of the SCIG commissary and do not involve any allegations of constitutional or statutory violations. The DOC defendants are therefore entitled to the qualified immunity they have asserted.

The claims against Verizon are dismissed with prejudice, and plaintiffs may not now amend the complaint to plead their claims against Verizon in contract, because this court is not the proper forum, in the first instance, for airing customer complaints about Verizon's service. As Verizon argues in its brief, disputes involving the cost or adequacy of telephone services are subject to the primary jurisdiction of the Pennsylvania Public Utility Commission ("PUC"). *See Behrend v. Bell Tel. Co.*, 243 A.2d 346, 347 (Pa. 1968) (stating that the PUC "has been vested by the Legislature with exclusive original jurisdiction over the reasonableness, adequacy and sufficiency of public utility services, including telephone services and directories"); *Elkin v. Bell Tel. Co.*, 420 A.2d 371, 374 (Pa. 1980) ("The PUC has long been recognized as the appropriate forum for the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services.").

"Primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *MCI Telecommunications*, 71 F.3d at 1103 (internal quotation omitted). Issues that implicate a utility's tariff are deemed to be within the special expertise of the PUC. *Id.* at 1104. Plaintiffs'

complaints about the terms and quality of Verizon's service implicate the utility's obligations under its tariff, so the doctrine of primary jurisdiction applies to their case.[12] Although the courts have jurisdiction ultimately to review acts and decisions of the PUC, "no principle has become more firmly established in Pennsylvania law than that the courts will not originally adjudicate matters within the jurisdiction of the PUC." *Behrend*, 243 A.2d at 348.

The claims against JLM are dismissed with prejudice, and plaintiffs may not amend their complaint to plead breach of contract against JLM, because they have failed to allege any specific facts that would be sufficient to sustain such a claim.

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[12]Wheeler did, in fact, seek to air his grievances about phone service at SCIG by means of the PUC's informal complaint process. In response to Wheeler's informal complaint, a PUC utility complaints investigator informed Wheeler that the PUC has no jurisdiction over matters relating to phone service within correctional facilities. *See* Plaintiffs' Response, Exhibit F (Letter dated April 15, 2003 from David P. Thompson to Christopher Wheeler). This position is inconsistent with the PUC's past exercise of jurisdiction over complaints similar to Wheeler's. *See Smith v. Verizon*, PUC Docket No. C-20030419 (granting summary judgment for Verizon in a case brought by an inmate complaining that rates for collect calls from prison had suddenly doubled); *Feigley v. AT&T*, PUC Complaint Docket No. C-00981434 (denying AT&T's motion for summary judgment and holding that a complaint concerning alleged overcharges for collect calls from prison is "squarely within the Commission's jurisdiction"). In fact, several formal complaints raising issues virtually identical to those plaintiffs raise in their Second Amended Complaint are now pending before the PUC. *See*, *e.g.*, *Pfeifly et al. v. Verizon*, PUC Complaint Docket No. C-20042802 (inmates complaining of disconnects, overcharges, blocked numbers, taped interruptions, service interruptions, and lack of responsiveness to customers); *Flood v. Verizon*, PUC Docket No. C-20042852 (same complaints as in *Pfeifly*); *Taylor v. Verizon*, PUC Complaint Docket No. C-20042878 (same complaints as in *Pfeifly* and *Flood*). If plaintiffs desire to pursue their claims against Verizon, they should avail themselves of the PUC's *formal* complaint process. Filing a formal complaint with the PUC results in a legal proceeding before a Commission administrative law judge.

Order

AND NOW, this _____ day of May 2005, upon consideration of the motions of the DOC Defendants and Vendor Defendants Access Catalog Co., L.L.C., Mike's Better Shoes, Jack L. Marcus, Inc., and Verizon Pennsylvania, Inc. to dismiss plaintiffs' Second Amended Complaint, and plaintiffs' responses thereto, IT IS HEREBY ORDERED that

(1) defendants' motions to dismiss plaintiffs' federal antitrust claims are GRANTED and plaintiffs' federal antitrust claims are DISMISSED with prejudice;

(2) defendants' motions to dismiss plaintiffs' common law fraud and negligent misrepresentation claims are GRANTED;

(3) plaintiffs' fraud and misrepresentation claims against the DOC Defendants and Vendor Defendants Jack L. Marcus, Inc. and Verizon Pennsylvania, Inc. are DISMISSED with prejudice;

(4) plaintiffs' fraud and misrepresentation claims against Vendor Defendants Access Catalog Co. and Mike's Better Shoes are DISMISSED with prejudice; however, plaintiffs may supplement their Second Amended Complaint, if they so desire, within twenty days of the court's disposition of the motions to dismiss plaintiffs' civil rights claims, to allege in a new count that the facts underlying their fraud claims state a claim for breach of contract;

(5) Vendor Defendants Jack L. Marcus, Inc. and Verizon Pennsylvania, Inc. and DOC Defendants Rosso and Spencer are dismissed as parties to this action.

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William H. Yohn, Jr., Judge